No. 77-1774

In the Supreme Court of the United States

OCTOBER TERM, 1978

NICOLA FORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1978. The petition for a writ of certiorari was filed on June 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner's convictions for mail fraud.

2. Whether the evidence showed that petitioner used the mails to promote the unlawful activity of arson, in violation of 18 U.S.C. 1952.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of five counts of mail fraud (Counts 1 through 5), in violation of 18 U.S.C. 1341, and one count of interstate travel in aid of arson (Count 6), in violation of 18 U.S.C. 1952. He was sentenced to concurrent terms of three years' imprisonment on counts 1 through 3, to be followed by concurrent terms of three years' probation on Counts 4 through 6. The court of appeals affirmed (Pet. App. A).

The evidence showed that in the spring of 1973 petitioner became the principal stockholder of a corporation that owned and operated the 1846 Colonial Inn, a bar and hotel in Crum Lynne, Pennsylvania (1 Tr. 30-32). Thereafter, petitioner experienced managerial and financial difficulties with the bar (1 Tr. 39-42, 88; 2 Tr. 19-20, 24; 3 Tr. 42, 43A-44). Accordingly, during the first half of 1974 he separately approached three employees to whom he offered substantial sums of money to burn down the bar; each refused (1 Tr. 41-42, 92-94; 2 Tr. 26-29). In late September 1974, petitioner advised a fourth employee that he had made arrangements to have the bar burned on October 13 for $5,000 (3 Tr. 45-46, 48-52). On October 4 and October 7 petitioner mailed to his insurance agency requests for significant increases in insurance coverage for the premises, and the insurance coverage was increased effective October 4, 1974 (2 Tr. 126-139; 3 Tr. 2-3; G. Exs. 6-8).[1]

On October 13, 1974, the 1846 Colonial Inn was destroyed by a fire of incendiary origin (4 Tr. 30, 51).[2] On December 6 and 17, 1974, and February 13, 1975, a claim

[1]These mailings formed the basis for Counts 1 and 2.

[2]Several persons were in the building when the fire started, but there were no serious injuries (3 Tr. 118-121, 133-137).

adjustment company acting on petitioner's behalf mailed various documents to his insurance company in connection with his claim of loss on the bar. Each mailing contained, *inter alia*, representations by petitioner that he believed the fire to be of undetermined origin and not the result of any action on his part (4 Tr. 64-112).[3]

ARGUMENT

1. Petitioner contends (Pet. 12-13) that the evidence failed to establish a sufficient nexus between his use of the mails and his scheme to commit arson and collect insurance to support his convictions for mail fraud.[4]

The offense of mail fraud is established by proof of a scheme to defraud and the mailing of a letter or other matter in furtherance of the scheme. Knowing use of the mails is shown " 'where such use can reasonably be foreseen, even though not actually intended * * * [and it] is not necessary that the scheme contemplate the use of the mails as an essential element.' " *United States* v. *Maze*, 414 U.S. 395, 399-400 (quoting *Pereira* v. *United States*, 347 U.S. 1, 8-9); *United States* v. *Kaplan*, 554 F. 2d 958, 965 (C.A. 9), certiorari denied *sub nom. Dolwig* v. *United States*, 434 U.S. 956. Furthermore, mailings are in furtherance of the scheme if they are "incident to an essential part of the scheme." *Pereira*, *supra*, 347 U.S. at 8.

Here the evidence clearly established that petitioner committed mail fraud. Petitioner devised a scheme to

[3]Counts 3 through 5 arose out of these mailings.

[4]Petitioner also objects to the district court's instructions on mail fraud (Pet. 12-13), but the grounds for his objection are not clear and he made no objection to the instructions at trial (Pet. 8). The record shows, in any event, that the court correctly instructed the jury about the elements of mail fraud (8 Tr. 33-36).

defraud his insurance company of the proceeds of the insurance policy covering the bar. On two occasions in furtherance of that scheme, he mailed requests for increases in the policy limits. After arranging for the bar to be burned, petitioner separately caused three "proof of loss" documents to be mailed to his insurer falsely representing that he was not responsible for the destruction of the bar. In short, petitioner's mailings were not only "closely related" (*Maze, supra,* 414 U.S. at 399) to his scheme, but obviously were also an integral part of it.[5]

2. Petitioner also challenges (Pet. 9-11) his conviction on Count 6 under the Travel Act, 18 U.S.C. 1952. The sentence petitioner received on the count was identical to and concurrent with those imposed on Counts 4 and 5. As we have shown, those convictions were valid, and accordingly this Court need not grant review to consider petitioner's claims with regard to Count 6. *Andresen* v. *Maryland,* 427 U.S. 463, 469 n. 4; *Barnes* v. *United States,* 412 U.S. 837, 848 n. 16. In any event, his contentions are without merit.

Count 6 charged that petitioner's mailings violated the Travel Act, 18 U.S.C. 1952 (a) (3), because they were used to carry on the crime of arson, in violation of the laws of

[5]*Kann* v. *United States,* 323 U.S. 88, and *Parr* v. *United States,* 363 U.S. 370, on which petitioner relies (Pet. 12-13), are inapposite. The mailings alleged in those cases were not used in furtherance of the fraudulent scheme. They were either mailings that occurred after the fruition of the scheme (*Kann* and *Parr*) or were mailings that the defendants were required by law to make (*Parr*). Here the mailings occurred before the fruition of the scheme and were not required by law.

Petitioner's hypothetical concerning mailings prior to the formation of the scheme to defraud (Pet. 13) bears no relation to the facts of this case or the district court's instructions.

Pennsylvania.[6] Petitioner alleges that the evidence was not sufficient to establish a violation of the Travel Act because the prosecution failed to prove that the mailings were used to foster the crime of arson (Pet. 10). Under Pennsylvania law, however, the crime of arson includes the starting of a fire "with intent of destroying or damaging any property, whether [one's] own or of another, to collect insurance for such loss." 18 C.P.S.A. § 3301(b)(3)(1973) (Pet. 11). In the instant case, the evidence established that petitioner mailed requests for increased insurance coverage, intending to defraud his insurance company by setting fire to the bar and collecting the increased proceeds for the loss. Accordingly, the mailings were used for the purpose of "carrying on" the crime of arson, as defined by Pennsylvania law, in violation of the Travel Act.[7]

Rewis v. *United States,* 401 U.S. 808, and *United States* v. *Archer,* 486 F. 2d 670 (C.A. 2), upon which petitioner relies (Pet. 10-11), are inapposite. In *Rewis* the defendants were convicted under the Travel Act for conducting a gambling operation frequented by out-of-state bettors. There was no evidence that the defendants actively sought

[6]The Travel Act makes it unlawful to travel or use any facility (including the mails) in interstate commerce with the intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity." 18 U.S.C. 1952(a)(3). The definition of "unlawful activity" includes arson, in violation of state or federal law. 18 U.S.C. 1952(b)(2).

[7]That Congress intended the Travel Act to prohibit the use of the mails in connection with arson such as that involved here is reflected in its legislative history. In 1965, the crime of arson was added to the definition of unlawful activity in subsection (b) (2) out of concern that arson was often used by organized crime to collect under insurance policies. See H.R. Rep. No. 264, 89th Cong., 1st Sess. (1965); *United States* v. *Nardello,* 393 U.S. 286, 291 n. 8.

interstate patronage, or that they themselves traveled or used facilities in interstate commerce. This Court held that Congress did not intend to make criminal activity a federal offense "solely because that activity is at times patronized by persons from another State" (401 U.S. at 812). In *Archer*, the Second Circuit applied the principles of *Rewis* to reverse the convictions of defendants involved in an incident of local corruption; the court found that interstate and foreign telephone calls from undercover agents to the defendants were in no way initiated by the defendants and were made by the agents solely to create federal jurisdiction. Here, in contrast, it is undisputed that the use of interstate facilities (the mails) was initiated by petitioner.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]Petitioner also objects to the district court's instructions on the Travel Act (Pet. 11), but his reasons are not clear, and again, no objection was made to the district court (Pet. 8). In this case the mailings were evidence of the state crime of arson (which includes burning to obtain insurance proceeds) and also evidence of the Travel Act violation. That does not mean, contrary to petitioner's assertion (Pet. 11), that "any state crime of arson could also constitute a federal crime."